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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 RODERICK WASHINGTON,  
12 Plaintiff,  
13 v.  
14 SHEN JAY FERN, et al.,  
15 Defendants.  
16

CASE NO. CV 22-3564-CBM (AS)

**REPORT AND RECOMMENDATION OF**  
**UNITED STATES MAGISTRATE JUDGE**

17 This Report and Recommendation is submitted to the Honorable  
18 Consuelo B. Marshall, United States District Judge, pursuant to 28  
19 U.S.C. § 636 and General Order 05-07 of the United States District  
20 Court for the Central District of California. For the reasons  
21 stated below, it is recommended that this action be dismissed with  
22 prejudice pursuant to 28 U.S.C. § 1915(g) and Rule 41(b) of Federal  
23 Rules of Civil Procedure.  
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I.

INTRODUCTION

On May 23, 2022, Roderick Washington ("Plaintiff"), a Los Angeles County inmate proceeding *pro se*, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 ("Complaint"). (Dkt. No. 1). Plaintiff states that he is a pre-trial detainee at the Los Angeles Men's Central Jail. (Dkt. No. 1 at 2). The Complaint names thirteen defendants including judges with the Los Angeles County Superior Court, members of the Los Angeles County Sheriff's Department, Deputy District Attorneys, and counsel for the Los Angeles County District Attorney's Office. Plaintiff seeks monetary damages based on asserted claims of constitutional deprivations arising from Plaintiff's arrest and prosecution in various criminal matters, including the fabrication of evidence, denial of his rights to a speedy preliminary hearing and a speedy trial, denial of access to the law library and the Courts, and cruel and unusual punishment based on his placement in administrative segregation.<sup>1</sup> (Dkt. No. 1 at 6-25). Because plaintiff is appearing *pro se* in this civil rights action, the Court must afford Plaintiff the benefit of any doubt. See Blaisdell v. Frappiea, 729 F.3d 1237, 1241 (9th Cir. 2013); Pouncil v Tilton,

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<sup>1</sup> The Court issued Orders directing Plaintiff to pay the Filing Fee or Show Cause why this action should not be dismissed pursuant to 28 U.S.C. § 1915(g) in two cases that Plaintiff has filed in this district nearly contemporaneously with this action: Case No. CV 22-1552-GW (AS), filed on March 7, 2022, and Case No. CV 22-1699-CBM (AS), filed on March 14, 2022. The Court notes that the Complaint filed in this action asserts claims that are duplicative of claims asserted in the actions filed on March 7 and March 14, 2022.

1 704 F.3d 568, 574-75 (9th Cir. 2012); Hebbe v. Pliler, 627 F.3d  
2 338, 342 (9th Cir. 2010).

3  
4 Plaintiff did not prepay the filing fees. Instead, he filed  
5 a Request to Proceed *in forma pauperis* ("IFP Request"). (Dkt. No.  
6 2). On June 24, 2022, the Court issued an Order to Pay the Filing  
7 Fees or Show Cause ("OSC") why Plaintiff should not be denied leave  
8 to proceed IFP and why this action should not be dismissed pursuant  
9 to 28 U.S.C. § 1915(g). (Dkt. No. 5). Plaintiff was admonished  
10 in the OSC that he would be precluded from proceeding IFP in this  
11 action unless he can show, at the time he initiated this action,  
12 he was "under imminent danger of serious physical injury." (*Id.*  
13 at 8-9 (citing 28 U.S.C. § 1915(g))). Plaintiff was explicitly  
14 warned that the action would be dismissed if he did not either pay  
15 the full filing fees or show cause why he should not be denied  
16 leave to proceed IFP on or before July 25, 2022. (*Id.* at 9).

17  
18 Plaintiff did not respond to the Court's June 24, 2022  
19 Order. Accordingly, on July 27, 2022, the Court issued a second  
20 Order to Show Cause why this action should not be dismissed pursuant  
21 to 28 U.S.C. § 1915(g). (Dkt. No. 6). The Court's July 27, 2022  
22 Order explicitly warned Plaintiff that failure to respond would  
23 result in the action being dismissed with prejudice for failure to  
24 prosecute and obey court orders. (*Id.*). As of the date of this  
25 Report and Recommendation, Plaintiff has failed to file a response  
26 to either OSC, set forth good cause for his failure to timely file  
27 a response, or pay the full filling fees in this action.

## II.

## DISCUSSION

## A. 28 U.S.C. § 1915(g)

In connection with the initial screening of the Complaint, the Court reviewed past civil actions filed by Plaintiff in the federal district courts and in the Ninth Circuit Court of Appeals. Plaintiff's litigation history reflects that he is subject to the provisions of 28 U.S.C. § 1915(g). Courts may raise § 1915(g) *sua sponte*. See, e.g., Strope v. Cummings, 653 F.3d 1271, 1273 (10th Cir. 2011) ("[W]e may raise the issue of [§ 1915(g)] strikes *sua sponte*"; and a district court has the discretion to revoke IFP privilege); Harris v. City of New York, 607 F.3d 18, 23 (2nd Cir. 2010) ("district courts may apply the three strikes rule *sua sponte*"); Maxton v. Bureau of Prisons Dir., 2019 U.S. Dist. Lexis 121840, at \*4, 2019 WL 3287832 (C.D. Cal. July 18, 2019) ("Courts may raise Section 1915(g) *sua sponte* and dismiss the action after providing the plaintiff with an opportunity to be heard.").

Pursuant to § 1915(g), a prisoner may not "bring a civil action or appeal a judgment in a civil action or proceeding" without prepayment of the filing fees:

if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

1 28 U.S.C. § 1915(g). Such dismissal is deemed a "strike." Further,  
2 the provisions of § 1915(g) apply to plaintiffs who were "in custody  
3 as the result of a conviction or who have been detained for an  
4 alleged criminal violation" at the time the action was filed. See  
5 Andrews v. King, 398 F.3d 1113, 1122 (9th Cir. 2005) (holding that  
6 the plaintiff "bears the burden of establishing that he was in INS  
7 custody and that he was not facing criminal charges **at the time he**  
8 **filed the actions**") (emphasis added).

9  
10 The Ninth Circuit has held that the phrase "fails to state a  
11 claim on which relief may be granted" as used in § 1915(g),  
12 parallels the language of Fed. R. Civ. P. 12(b)(6) and carries the  
13 same interpretation; that the word "frivolous" refers to a case  
14 that is "of little weight or importance: having no basis in law or  
15 fact"; and the word "malicious" refers to a case "filed with the  
16 'intention or desire to harm another.'" See Andrews, 398 F.3d at  
17 1121 (explaining the terms used in § 1915(g)). In addition, the  
18 Ninth Circuit has held that the prior denial of IFP status on the  
19 basis of frivolity or failure to state a claim constitutes a strike  
20 for purposes of § 1915(g). See O'Neal v. Price, 531 F.3d 1146,  
21 1153-54 (9th Cir. 2008) (also stating that a dismissal without  
22 prejudice may count as a strike). Additionally, appellate  
23 affirmances do not count as strikes when the appeal merely affirms  
24 the decision of the district court, but an appeal of a dismissal  
25 will count as a separate strike if the appellate court "expressly  
26 states that the appeal itself was frivolous, malicious or failed  
27 to state a claim." El-Shaddai v. Zamora, 833 F.3d 1036, 1045-46  
28 (9th Cir. 2016). Finally, the Supreme Court has confirmed that

1 § 1915(g) applies "to any dismissal for failure to state a claim,  
2 whether with prejudice or without." Lomax v. Ortiz-Marquez, 140  
3 S. Ct. 1721, 1723 (2020).

4  
5 Once a plaintiff has accumulated three strikes, he is  
6 prohibited from pursuing any subsequent civil action without  
7 prepayment of the full filing fees, unless he makes a showing that  
8 he was "under imminent danger of serious physical injury" based on  
9 the circumstances "at the time the complaint was filed, not at some  
10 earlier or later time." Andrews v. Cervantes, 493 F.3d 1047, 1052-  
11 53 (9th Cir. 2007); 28 U.S.C. § 1915(g). Further, "the prisoner  
12 bears the ultimate burden of persuading the court that § 1915(g)  
13 does not preclude IFP status." Richey v. Dahne, 807 F.3d 1202,  
14 1206 (9th Cir. 2015); see also Harris v. Harris, 935 F.3d 670, 673  
15 (9th Cir. 2019) (once a prima facie case has been made for the  
16 applicability of § 1915(g), "the burden shifts to the plaintiff to  
17 persuade the court that § 1915(g) does not apply" (internal  
18 quotation marks and citation omitted)).

19  
20 In light of the foregoing standards, the Court has taken  
21 judicial notice of the following prior civil actions filed by  
22 Plaintiff in the United States District Courts of California that  
23 qualify as strikes for purposes of § 1915(g). See Fed. R. Evid.  
24 201(b)(2), (c)(1):

25  
26 (1) - (3) Washington v. Gomez, 1999 U.S. App. Lexis 22877,  
27 194 F.3d 1319, 1999 WL 730352 (9th Cir. Sept. 16, 1999). The Ninth  
28 Circuit affirmed the dismissal of Plaintiff's civil rights case by

1 the District Court for the Northern District of California in Case  
2 No. C 98-1831-TEH (PR). The Ninth Circuit noted that Plaintiff  
3 had been a prisoner at the time that he filed his Complaint in the  
4 action, and, in his appeal, Plaintiff did "not contend that the  
5 district court erred by identifying three prior actions as  
6 qualifying 'strikes' under § 1915(g)." After concluding that  
7 Plaintiff had failed to allege any facts showing that he had been  
8 facing an imminent threat of serious physical injury at the time  
9 the action was initiated, the Ninth Circuit held that the District  
10 Court did not err in dismissing the action pursuant to § 1915(g).  
11 In the district court opinion that was affirmed on appeal, District  
12 Judge Henderson found that Plaintiff had had "three or more prior  
13 prisoner actions dismissed by this court on the grounds that they  
14 are frivolous, malicious, or fail to state a claim upon which  
15 relief may be granted." Judge Henderson's opinion cites three  
16 earlier cases: Washington v. Cambra, No. C 95-3356-TEH (N.D. Cal.  
17 Oct. 2, 1995) (order of dismissal); Washington v. Cambra, No. C  
18 95-3641-TEH (N.D. Cal. Nov. 7, 1995) (order of dismissal);  
19 Washington v. Cambra, No. C 95-3763-TEH (N.D. Cal. Nov. 20, 1995)  
20 (order of dismissal). See Washington v. Gomez, et al., 1998 WL  
21 296370 (N.D. Cal. June 1, 1998) (Case No. C 98-1831-THE-(PR))  
22 (order of dismissal). Although the Ninth Circuit's opinion does  
23 not itself count as a "strike," the Ninth Circuit affirmed the  
24 finding of the district court in Case No. C 98-1831 that Plaintiff's  
25 three earlier cases in the Northern District of California  
26 constituted "strikes" within the meaning of § 1915(g), and  
27 Plaintiff did not contend that the "strikes" from the cited cases  
28 he filed in 1995 did not qualify as "strikes." Accordingly, the

1 three "strikes" that were identified by District Judge Henderson  
2 in Case No. C 98-1831 continue to count as "strikes" against  
3 Plaintiff in this action.

4  
5 (4) Washington v. United States District Court, Case No. CV-  
6 01-00715-UA (AJW), United States District Court for the Central  
7 District of California, filed January 24, 2001. Plaintiff sought  
8 leave to proceed IFP. (Dkt. No. 1). On February 1, 2001, the case  
9 was dismissed on the grounds that it failed to state a claim upon  
10 which relief could be granted. (Dkt. No. 2). Plaintiff filed an  
11 appeal to the Ninth Circuit (Dkt. No. 3), which was denied on the  
12 grounds that the appeal lacked merit. (Dkt. Nos. 5-6). This  
13 constitutes only one "strike" because the Ninth Circuit did not  
14 find that the appeal was "frivolous." See El-Shaddai v. Zamora,  
15 833 F.3d 1036, 1045-46 (9th Cir. 2016) (an appellate decision does  
16 not count as a separate strike unless the appellate court  
17 "expressly states that the appeal itself was frivolous, malicious,  
18 or fails to state a claim").

19  
20 (5) Washington v. United States District Court, Case No. CV-  
21 07-01277-UA, United States District Court for the Central District  
22 of California, filed February 25, 2007. On March 23, 2007,  
23 Plaintiff's IFP Request was denied and the action dismissed on the  
24 ground that "Plaintiff is a 'three strikes' filer within the  
25 meaning of 28 U.S.C. § 1915(g), and his allegations do not show  
26 that he 'is under imminent danger of serious physical injury.'" (Dkt. No. 2). Plaintiff filed a Notice of Intent to Appeal the  
27 denial of his IFP Request to the Ninth Circuit (Dkt. Nos. 3-5),  
28



1 and the District Judge certified that the "proposed appeal is not  
 2 taken in good faith under 28 U.S.C. § 1915(g) and is frivolous,  
 3 without merit and does not present a substantial question." (Dkt.  
 4 No. 6 at 3).

5  
 6 (6) Washington v. State of Cal., et al., Case No. CV-07-02965-  
 7 UA (AJW), United States District Court for the Central District of  
 8 California, filed May 4, 2007. Plaintiff's IFP Request was denied  
 9 on May 18, 2007, for failure to state any claim upon which relief  
 10 may be granted. (Dkt. No. 3 at 2).

11  
 12 (7) Washington v. Baca, Case No. CV-08-02437-UA (AJW), United  
 13 States District Court for the Central District of California, filed  
 14 April 14, 2008. Plaintiff's IFP Request was denied on April 28,  
 15 2008, citing Plaintiff's earlier case, Washington v. Inglewood  
 16 Parole Region, Case No. CV-99-12212-UA, in which plaintiff was  
 17 ordered to attach a "Disclosure of Three Strikes" form to any  
 18 further application for leave to proceed IFP. (Dkt. No. 2).<sup>2</sup>

19  
 20 <sup>2</sup> Plaintiff's Case No. CV-99-12212-UA was closed on December  
 21 7, 1999 (see above). The Central District of California's Civil  
 22 Docket reflects that Plaintiff was ordered by District Judge Hatter  
 23 on October 20, 2000, to "attach a copy" of a notice providing  
 24 "Disclosure of 'Three Strikes' Under 28 U.S.C. § 1915(g) to (a)  
 25 any complaint or (b) any application for leave to proceed *in forma*  
 26 *pauperis*, which Plaintiff files in any civil action or appeal in  
 any United States District Court or in any United States Court of  
 Appeals." (Case No. CV-99-12212, ECF No. 18 (some internal  
 quotation marks omitted)). In the "Disclosure" statement drafted  
 by the District Court, the District Court cited 8 cases filed by  
 Plaintiff that were closed between 1995 and 1998 and states that:

27 Roderick Washington has, on three or more prior  
 28 occasions while incarcerated, brought an action or appeal  
 in a court of the United States that was dismissed on

1 Plaintiff appealed the denial of his IFP Request to the Ninth  
2 Circuit (Dkt. Nos. 3-6), and, on June 12, 2008, the Ninth Circuit  
3 denied plaintiff leave to proceed with the appeal on the grounds  
4 that "the appeal is so insubstantial as to not warrant further  
5 review." (Dkt. No. 7).

6  
7 In addition, the Court takes judicial notice of the following  
8 cases that previously found that Plaintiff could not proceed IFP  
9 in a civil action because he had already accumulated three  
10 "strikes" prior to when he initiated those actions:

11  
12 (1) Washington v. Gomez, 1996 U.S. Dist. Lexis 17031, 1996 WL  
13 682026 (N.D. Cal. Nov. 15, 1996) (denying Plaintiff's IFP Request  
14 and dismissing Case No. C 98-04064-TEH on the grounds that  
15 Plaintiff had "had 3 or more prior prisoner actions dismissed by  
16 this court on the grounds that it is frivolous, malicious, or fails  
17 to state a claim upon which relief may be granted").

18  
19 (2) Washington v. Inglewood Parole Reg., Case No. CV-99-12212-  
20 UA, United States District Court for the Central District of  
21 California, filed November 24, 1999. The case was closed on  
22 December 7, 1999, upon denial of Plaintiff's IFP Request. In a  
23 Report and Recommendation recommending that Plaintiff's subsequent  
24 Motion for Reconsideration be denied, the assigned magistrate judge  
25 stated that Plaintiff was "barred from proceeding IFP under 28

26  
27 the grounds that it was frivolous, malicious, or failed  
28 to state a claim upon which relief might be granted.

1 U.S.C. § 1915(g) when he filed his IFP application." Further, it  
2 was noted that Plaintiff had filed 52 actions since 1995, and the  
3 district court took judicial notice of decisions in the Northern  
4 District of California that had dismissed actions filed by  
5 Plaintiff in that District on the grounds that Plaintiff had  
6 already accumulated three or more "strikes." The district court  
7 also took judicial notice of a case in the Eastern District of  
8 California in which Plaintiff's IFP status had been revoked after  
9 the district court discovered that Plaintiff had been barred by  
10 the Northern District from proceeding IFP pursuant to § 1915(g),  
11 citing Washington v. Galaza, Case No. CV 98-05379-OWW-SMS-P.  
12 Finally, the district court noted that Plaintiff had  
13 "misrepresented the number of prior lawsuits he has brought in  
14 federal court in connection with his IFP application." (Case No.  
15 CV-99-12212, Dkt. No. 15 at 6-9, 11). The Report and Recommendation  
16 in that action was adopted by District Judge Hatter, Plaintiff's  
17 motion for reconsideration was denied (Dkt Nos. 19, 28), and the  
18 Ninth Circuit declined to proceed on Plaintiff's appeal for lack  
19 of jurisdiction (Dkt. Nos. 38-39).

20  
21 (3) Washington v. Centinela Hospital, Case No. CV-03-07353-UA  
22 (AJW), United States District Court for the Central District of  
23 California, filed October 15, 2003. On November 6, 2003,  
24 Plaintiff's IFP Request was denied and the case was dismissed on  
25 the grounds that Plaintiff had already accrued more than three  
26 strikes. (Dkt. Nos. 2, 8). Plaintiff's appeal to the Ninth Circuit  
27 Court of Appeal was subsequently dismissed as lacking merit. (Dkt.  
28 No. 12).

1           (4) Washington v. Gomez, et al., Case No. CV-05-05885-UA  
2 (AJW), United States District Court for the Central District of  
3 California, filed August 11, 2005. On August 19, 2005, Plaintiff's  
4 IFP Request was denied and the case was dismissed on the grounds  
5 that plaintiff had already accumulated "three strikes." (Dkt. No.  
6 2 at 1).

7  
8           (5) Washington v. United States District Court, Case No. C  
9 07-0609 TEH, 2008 WL 787125 (N.D. Cal. Mar. 20, 2008). Plaintiff's  
10 IFP Request was denied pursuant to § 1915(g). Noting that Plaintiff  
11 was "a frequent litigant in the federal courts," District Judge  
12 Henderson cited the following cases that count as prior "strikes"  
13 against Plaintiff: (1) Washington v. Cambra, No. C 95-3356 TEH  
14 (N.D. Cal. Oct. 2, 1995) (order of dismissal); (2) Washington v.  
15 Cambra, No. C 95-3641 TEH (N.D. Cal. Nov. 7, 1995) (order of  
16 dismissal); (3) Washington v. Cambra, No. C 95-3763 TEH (N.D. Cal.  
17 Nov. 20, 1995) (order of dismissal); (4) Washington v. United  
18 States District Court, No. C 04-5313 TEH (N.D. Cal. Dec. 20, 2004)  
19 (order of dismissal).

20  
21           Although a dismissal of another civil action on the grounds  
22 that Plaintiff had already accumulated three "strikes" does not  
23 itself count as a "strike," all such earlier dismissals support  
24 the Court's determination in this action that Plaintiff may not  
25 proceed without prepayment of the filing fees. See El-Shaddai,  
26 833 F.3d at 1042 ("Where a dismissal is based solely on a finding  
27 that the plaintiff has previously incurred at least three strikes,  
28 without any additional finding that the instant action is itself

1 frivolous, malicious, or fails to state a claim, the dismissal does  
2 not count as an additional strike."). The Court, however, may take  
3 judicial notice of the findings of the various other district  
4 courts that Plaintiff had already accumulated at least three  
5 qualifying "strikes" by 1996. Moreover, the decisions in these  
6 other district court cases attest to Plaintiff's protracted and  
7 persistent pattern of filing frivolous pleadings in the federal  
8 courts.

9  
10 Finally, the Court takes judicial notice of a proceeding in  
11 2006 in the California Court of Appeal in which Plaintiff was  
12 declared a vexatious litigant pursuant to Cal. Code Civ. Proc. §§  
13 391, 391.7. Although this state court decision cannot support the  
14 Court's finding herein that Plaintiff is barred from proceeding  
15 IFP in any civil action or appeal of a civil action in a **federal**  
16 **court** unless he can show that he was under "imminent danger of  
17 serious physical injury," 28 U.S.C. § 1915(g), it sheds additional  
18 light on Plaintiff's prodigious litigation history. The California  
19 Court of Appeal cited "22 meritless appeals that Mr. Washington  
20 has filed in the Court of Appeal since September 2004," and found  
21 that Plaintiff "clearly meets the statutory definition of a  
22 vexatious litigant." In re Finding of Roderick Washington as a  
23 Vexatious Litigant, 2006 Cal. App. Unpub. 2006 WL 1401729, at \*2  
24 (Cal. App. May 23, 2006).

25  
26 Accordingly, because Plaintiff had already accumulated more  
27 than three strikes before he initiated this action, Plaintiff is  
28 precluded from proceeding IFP herein unless he can show that, at

1 the time he filed this action, he was "under imminent danger of  
2 serious physical injury." 28 U.S.C. §1915(g). The availability  
3 of the "imminent danger" exception "turns on the conditions a  
4 prisoner faced at the time the complaint was filed, not at some  
5 earlier or later time." See Andrews, 493 F.3d at 1053.

6  
7 The Court provided Plaintiff with notice of its finding that  
8 he was subject to the provisions of § 1915(g) and the opportunity  
9 to be heard by issuance of OSCs on June 24 and July 27, 2022. (Dkt.  
10 Nos. 5-6). Plaintiff has failed to meet his burden of persuading  
11 the Court that he should not be precluded from proceeding IFP in  
12 this action despite having previously collected more than three  
13 strikes.

14  
15 In addition, in the June 24, 2022 OSC, Plaintiff was  
16 admonished that, because he already had accumulated more than three  
17 strikes before he filed his Complaint in this action, he would be  
18 unable to proceed IFP in this action unless he could show that he  
19 was facing "imminent danger of serious physical injury" at the time  
20 he initiated the action. (Dkt. No. 5 at 8-9). Plaintiff failed  
21 to even argue that this exception applied to his situation.  
22 Further, nothing in the factual allegations in the Complaint raises  
23 a reasonable inference that Plaintiff faced imminent danger of  
24 serious physical injury at the time that he initiated this action.  
25 Therefore, the Court finds that Plaintiff has failed to carry his  
26 burden of showing that, at the time he filed this action, he was  
27 "under imminent danger of serious physical injury." 28 U.S.C. §  
28 1915(g).

Accordingly, because Plaintiff had accumulated more than three strikes while a prisoner, Plaintiff was a prisoner at the time that he filed this action, and Plaintiff has made no showing that he faced imminent danger of physical injury, Plaintiff is precluded from proceeding IFP herein. Plaintiff may not proceed in this action without pre-payment of the full filing fees. Plaintiff has been provided with notice that this action would be dismissed if he did not pay the full filing fees, and he has not done so. The Court therefore recommends that Plaintiff be denied leave to proceed IFP and that this action be dismissed.

#### **B. Rule 41(b)**

"Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court." Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992); Fed. R. Civ. P. 41(b);<sup>3</sup> see also Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 947 (9th Cir. 1976) ("[A] District

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<sup>3</sup> Rule 41(b) states that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). "[W]hereas the plain language of Rule 41(b) suggests that [involuntary] dismissals may only result from a defendant's motion, . . . courts may dismiss under Rule 41(b) sua sponte . . . ." Hells Canyon Preservation Council v. United States Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005); see also Link v. Walsh R.R. Co., 370 U.S. 626, 630 (1962) ("Neither the permissive language of . . . Rule [41(b)] – which merely authorizes a motion by the defendant – nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief.").

1 Court has the power to dismiss a claim of a plaintiff with prejudice  
2 [pursuant to Rule 41(b)] for failure to comply with an order of  
3 the court."). Moreover, "[a]ll federal courts are vested with  
4 inherent powers enabling them . . . to ensure obedience to their  
5 orders." United States v. W.R. Grace, 526 F.3d 499, 509 (9th Cir.  
6 2008) (en banc) (citations and internal quotation marks omitted);  
7 Aloe Vera of Am., Inc. v. United States, 376 F.3d 960, 964-65 (9th  
8 Cir. 2004) (per curiam); see also Ferdik, 963 F.2d at 1260  
9 ("District courts have the inherent power to control their dockets  
10 and, '[i]n the exercise of that power they may impose sanctions  
11 including, where appropriate, . . . dismissal of a case.'" (citation omitted)). "These powers are 'governed not by rule or  
12 statute but by the control necessarily vested in courts to manage  
13 their own affairs so as to achieve the orderly and expeditious  
14 disposition of cases.'" Chambers v. NASCO, Inc., 501 U.S. 32, 43  
15 (1991) (quoting Link v. Walsh R.R. Co., 370 U.S. 626, 630-31  
16 (1962)).  
17

18  
19 In determining whether to dismiss a case for failure to comply  
20 with a court order, district courts must weigh five factors: "(1)  
21 the public's interest in expeditious resolution of litigation; (2)  
22 the court's need to manage its docket; (3) the risk of prejudice  
23 to the defendant; (4) the public policy favoring disposition of  
24 cases on their merits and (5) the availability of less drastic  
25 sanctions."<sup>4</sup> Olmstead v. Dell, Inc., 594 F.3d 1081, 1084 (9th Cir.

26  
27 <sup>4</sup> "These factors 'are not a series of conditions precedent  
28 before the judge can do anything,' but a 'way for a district judge  
to think about what to do.'" In re Phenylpropanolamine (PPA) Prod.



2010), *overruled on other grounds by* Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1117 (9th Cir. 2020) (citation omitted); Bautista v. Los Angeles Cty., 216 F.3d 837, 841 (9th Cir. 2000).

The Ninth Circuit “may affirm a dismissal where at least four factors support dismissal . . . or where at least three factors “strongly” support dismissal.” Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (quoting Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998)). As set forth below, the Court finds that four of the five factors strongly weigh in favor of dismissal.

# **1. The Five Factors Support Dismissal**

## **a. The Public’s Interest in Expeditious Resolution of Litigation**

The Ninth Circuit has explained, as to the first factor, that “[t]he public’s interest in expeditious resolution of litigation always favors dismissal.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)) (internal quotation omitted). Here, Plaintiff has failed to respond to the Court’s June 24 and July 27, 2022 OSCs. This factor therefore weighs in favor of dismissal.

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Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006) (quoting Valley Eng’rs Inc. v. Elect. Eng’g Co., 158 F.3d 1051, 1057 (9th Cir. 1998)).

1 See Pagtalunan, 291 F.3d at 642 (Plaintiff's failure to pursue the  
2 case for almost four months weighed in favor of dismissal).

3  
4 **b. The Court's Need to Manage Its Docket**

5  
6 The second factor - the Court's need to manage its docket -  
7 similarly weighs in favor of dismissal. Courts have the "power to  
8 manage their dockets without being subject to the endless vexatious  
9 noncompliance of litigants." See Ferdik v. Bonzelet, 963 F.2d  
10 1258, 1261 (9th Cir. 1992). Thus, the second factor focuses on  
11 whether a particular case has "consumed . . . time that could have  
12 been devoted to other cases on the [court's] docket." See  
13 Pagtalunan, 291 F.3d at 642; Edwards v. Marin Park, Inc., 356 F.3d  
14 1058, 1065 (9th Cir. 2004) ("[R]esources continue to be consumed  
15 by a case sitting idly on the court's docket.").

16  
17 On June 24 and July 27, 2022, the Court issued OSCs ordering  
18 Plaintiff to show cause why this action should not be dismissed  
19 pursuant to 28 U.S.C. § 1915(g). To date, Plaintiff has not  
20 complied with the Court's Orders, sought an extension of time to  
21 do so, or otherwise communicated with the Court.

22  
23 As a result, the Court remains unaware if or how Plaintiff  
24 intends to proceed with this matter. The Court expended valuable  
25 time preparing the OSCs. Thus, Plaintiff's case has "consumed .  
26 . . time that could have been devoted to other cases on the  
27 [court's] docket." See Pagtalunan, 291 F.3d at 642. The Court  
28 cannot continue to spend valuable resources attempting to move

1 forward a case that Plaintiff does not wish to expeditiously  
2 pursue. Consequently, the Court's need to manage its docket favors  
3 dismissal.

4  
5 **c. The Risk of Prejudice to Defendants**

6  
7 The third factor - the risk of prejudice to the defendant -  
8 also favors dismissal. "A defendant suffers prejudice if the  
9 plaintiff's actions impair the defendant's ability to go to trial  
10 or threaten to interfere with the rightful decision of the case."  
11 In re Phenylpropanolamine (PPA) Prod. Liab. Litig., 460 F.3d 1217,  
12 1227 (9th Cir. 2006) (quoting Adriana Int'l Corp. v. Thoeren, 913  
13 F.2d 1406, 1412 (9th Cir. 1990)). "[T]he risk of prejudice to the  
14 defendant is related to the plaintiff's reason for defaulting in  
15 failing to timely amend." Yourish v. Cal. Amplifier, 191 F.3d 983,  
16 991 (9th Cir. 1999); see also Malone v. U.S. Postal Serv., 833 F.2d  
17 128, 131 (9th Cir. 1987) ("Whether prejudice is sufficient to  
18 support an order of dismissal is in part judged with reference to  
19 the strength of the plaintiff's excuse for the default.").

20  
21 Here, Plaintiff has proffered no excuse for his failure to  
22 comply with the Court's orders, see In re Phenylpropanolamine (PPA)  
23 Prod. Liab. Litig., 460 F.3d at 1227 ("The law . . . presumes  
24 prejudice from unreasonable delay."); Pagtalunan, 291 F.3d at 643  
25 ("[Unreasonable] delay inherently increases the risk that  
26 witnesses' memories will fade and evidence will become stale.");  
27 In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994) ("[T]he failure to  
28 prosecute diligently is sufficient by itself to justify dismissal

1 . . . [t]he law presumes injury from unreasonable delay.” (quoting  
2 Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976))),  
3 and he has not communicated with the Court in response to either  
4 OSC. Given the absence of any explanation for it, the Court finds  
5 Plaintiff’s delay in prosecuting this case to be unreasonable.  
6 Accordingly, prejudice is presumed and weighs in favor of  
7 dismissal.

8  
9 **d. Public Policy Favoring Disposition on the Merits**

10  
11 The fourth factor – the public policy favoring the disposition  
12 of cases on their merits – ordinarily, as here, weighs against  
13 dismissal. See In re Phenylpropanolamine (PPA) Prod. Liab. Litig.,  
14 460 F.3d at 1228. However, “this factor ‘lends little support’ to  
15 a party [such as Plaintiff,] whose responsibility it is to move a  
16 case toward disposition on the merits but whose conduct impedes  
17 progress in that direction.” Id.; see also Morris v. Morgan Stanley  
18 & Co., 942 F.2d 648, 652 (9th Cir. 1991) (“Although there is indeed  
19 a policy favoring disposition on the merits, it is the  
20 responsibility of the moving party to move towards that disposition  
21 at a reasonable pace, and to refrain from dilatory and evasive  
22 tactics.”); Moralez v. City of Fresno, 2006 WL 2085036, at \*2 (E.D.  
23 Cal. July 25, 2006) (“Public policy favoring disposition of cases  
24 on their merits also has little or no weight in actions where  
25 plaintiffs lack enough of an interest to file an amended complaint.  
26 The public and the court have no interest in determining the truth  
27 or falsity of the allegations that [p]laintiffs might raise in an  
28

1 amended complaint if [p]laintiffs never file an amended  
2 complaint.").

3  
4 **e. Availability of Less Drastic Alternatives**

5  
6 Less drastic alternatives to dismissal include warning a party  
7 that dismissal could result from failure to obey a court order.  
8 See Malone v. U.S. Postal Serv., 833 F.2d 128, 132 n.1 (9th Cir.  
9 1987) (internal quotation marks omitted). The Ninth Circuit has  
10 explained that "[a] district court need not exhaust every sanction  
11 short of dismissal before finally dismissing a case, but must  
12 explore possible and meaningful alternatives." Henderson v.  
13 Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986). Furthermore, "a  
14 district court's warning to a party that his [or her] failure to  
15 obey the court's order will result in dismissal can satisfy the  
16 'consideration of alternatives' requirement." Ferdik, 963 F.2d at  
17 1262 (citing Malone, 833 F.2d at 132-33; Henderson, 779 F.2d at  
18 1424).

19  
20 Here, the Court considered and implemented less drastic  
21 alternatives prior to dismissal. The Court's June 24, 2022 OSC  
22 warned Plaintiff that a failure to comply with the Court's order  
23 would result in dismissal of his case, (Dkt. No. 5 at 9), and the  
24 Court's July 22, 2022 OSC warned Plaintiff that failure to timely  
25 respond to the Court's Order "will result in a recommendation that  
26 this action be dismissed with prejudice" (Dkt. No. 6 at 1).  
27 Plaintiff did not respond to either Order. On this record, the  
28 Court finds that Plaintiff has lost interest in his own lawsuit,

1 and any less drastic alternatives to dismissal would be inadequate  
2 to remedy Plaintiff's failure to prosecute and obey Court orders.

3  
4 **2. Dismissal of This Action with Prejudice Under Rule 41(b)**  
5 **Is Appropriate**

6  
7 As discussed above, four of the Rule 41(b) dismissal factors  
8 weigh in favor of dismissal, whereas only one factor (at best)  
9 slightly weighs against dismissal. "While the public policy  
10 favoring disposition of cases on their merits weighs against  
11 [dismissal], that single factor is not enough to preclude  
12 imposition of this sanction when the other four factors weigh in  
13 its favor." Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1007,  
14 1022 (9th Cir. 2002); see also Dreith v. Nu Image, Inc., 648 F.3d  
15 779, 788 (9th Cir. 2011) (quoting Yourish, 191 F.3d at 990) ("We  
16 may affirm a dismissal where at least four factors support  
17 dismissal, or where at least three factors strongly support  
18 dismissal.").

19  
20 Rule 41(b) states, in relevant part, "dismissal under this  
21 subdivision (b) and any dismissal not under this rule - except one  
22 for lack of jurisdiction, improper venue, or failure to join a  
23 party under Rule 19 - operates as an adjudication on the merits."  
24 Fed. R. Civ. P. 41(b). The Court recommends dismissal of this  
25 action because of Plaintiff's failure to prosecute and obey Court  
26 orders. As this case does not fall into one of the three exceptions  
27 set out in Rule 41(b), the dismissal will operate as an adjudication  
28 on the merits. Thus, the Court recommends that this dismissal be

1 with prejudice to Plaintiff's refiling of a new complaint based on  
2 the same allegations. See Stewart v. U.S. Bancorp, 297 F.3d 953,  
3 956 (9th Cir. 2002) (dismissal interpreted as an adjudication on  
4 the merits unless one of the Rule 41(b) exceptions applies); Owens  
5 v. Kaiser Health Plan, Inc., 244 F.3d 708, 714 (9th Cir. 2001)  
6 (dismissal for failure to prosecute is treated as adjudication on  
7 the merits (citing United States v. Schimmels (In re Schimmels),  
8 127 F.3d 875, 884 (9th Cir. 1997)).

9  
10 Plaintiff was expressly warned about the possibility of  
11 dismissal in the event of his failure to respond to the Court's  
12 orders. Plaintiff will have the opportunity to file Objections to  
13 this Report and Recommendation if he wishes to contest the  
14 dismissal of this action.

15  
16 **III.**

17 **RECOMMENDATION**

18  
19 For the foregoing reasons, IT IS RECOMMENDED that the District  
20 Judge issue an Order: (1) accepting this Report and Recommendation;  
21 (2) denying Plaintiff's IFP status (Dkt. No. 2); and (3) dismissing  
22 this action with prejudice pursuant to 28 U.S.C. § 1915(g) and Rule  
23 41(b) of the Federal Rules of Civil Procedure.

24  
25 DATED: August 26, 2022

26 /s/  
27 ALKA SAGAR  
28 UNITED STATES MAGISTRATE JUDGE

**NOTICE**

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.